

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR -8 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0314-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JAMES RANDALL HALSTEAD,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063730

Honorable Richard D. Nichols, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara La Wall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Law Office of Ronald Zack
By Ronald Zack

Tucson
Attorney for Petitioner

ECKERSTROM, Judge.

¶1 James Halstead petitions this court for review of the trial court's order denying his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P.

We will not disturb this ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Halstead was convicted after a jury trial of three counts of sexual conduct with a minor under the age of twelve and one count of furnishing obscene or harmful items to a minor. The trial court sentenced him to three consecutive terms of life imprisonment for the sexual conduct convictions and a concurrent, 2.5-year prison term for furnishing obscene or harmful items to a minor. We affirmed his convictions and sentences on appeal. *State v. Halstead*, No. 2 CA-CR 2008-0228 (memorandum decision filed Jun. 1, 2009).

¶3 Halstead filed a notice and petition for post-conviction relief, raising claims of ineffective assistance of counsel and prosecutorial misconduct. The trial court summarily dismissed his petition. Halstead raises the same claims on review, again asserting prosecutorial misconduct and arguing his trial counsel had been ineffective in failing to object to: (1) testimony by an expert witness regarding common behavior by sex abuse victims, based largely on “hypothetical” situations grounded in the facts of this case; (2) testimony concerning other, uncharged acts of sexual conduct with the victim; (3) questions by the state that exceeded the court’s order limiting the testimony of the victim’s counselor; (4) testimony that Halstead had only returned to Arizona because he believed the statute of limitations had run; and (5) a doctor’s testimony suggesting the victim’s behavior was consistent with someone who had undergone a traumatic experience, which Halstead asserts “improperly corroborated [the victim]’s testimony.”

¶4 We first observe that Halstead’s prosecutorial misconduct claim is precluded because it could have been raised on appeal. *See* Ariz. R. Crim. P. 32.2(a)(1). Accordingly, the trial court did not err in summarily denying Halstead relief on that claim. Turning now to Halstead’s claims of ineffective assistance of trial counsel, Halstead was required to demonstrate that his counsel’s conduct fell below prevailing professional norms and that the conduct prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). And, if Halstead did not make a sufficient showing on either part of the *Strickland* test, his claim of ineffective assistance of counsel fails. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶5 As we noted above, Halstead argues his trial counsel was ineffective in failing to object to (1) certain expert witness testimony based on general characteristics of sex abuse victims and (2) testimony by the victim’s counselor that exceeded the trial court’s order limiting that testimony to the frequency and number of sessions she attended and “the general types of techniques that were used[,] . . . with very little elaboration.” We conclude the court did not err in rejecting these claims.

¶6 Even assuming there was a valid basis for counsel to have objected to this testimony, counsel’s failure to do so does not necessarily fall below prevailing professional norms. Instead, we presume “that counsel’s conduct falls within the wide range of reasonable professional assistance” that “might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689, *quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955); *accord State v. Shurz*, 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993). To overcome this presumption, Halstead must show counsel’s decisions were not tactical in nature, but

the result of “ineptitude, inexperience or lack of preparation.” *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Thus, disagreements about trial strategy will not support an ineffective assistance claim if the challenged conduct has some reasoned basis. *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985).

¶7 Our review of the record shows that trial counsel, through cross-examination, sought to bolster Halstead’s defense by introducing and relying upon testimony of a similar character. For example, during cross-examination, the expert witness who testified about common characteristics of sex abuse victims also testified that people under stress were “more likely to acquiesce” to leading questions, that “children may falsely accuse somebody of a sexual crime in order to protect their mother,” and that many of the symptoms she had described as common to sex abuse victims were not sufficient to “diagnose[] sexual abuse” and could arise “for any number of reasons.” Based on counsel’s questioning, it is possible counsel did not object to the witness’s statements during direct examination because he believed he could effectively discredit the witness, therefore undermining the state’s case, by posing the same type of hypothetical questions used by the prosecutor. Indeed, Halstead’s counsel relied on this testimony during closing argument, pointing out the expert could only speak in generalities and that her list of common characteristics was “so abstract, . . . so general, that no matter what anybody does in their life, it can fit into that.”

¶8 Similarly, during cross-examination of the victim’s counselor, Halstead’s attorney—despite the trial court’s order limiting the counselor’s testimony—further addressed the victim’s development of intricate fantasies, and pointed out the counselor

had no information about the victim's use of fantasy prior to the alleged sexual abuse. And counsel explored difficulties in the victim's relationship with her mother, which he emphasized during closing argument by suggesting the victim may have fabricated her accusations because she felt "chronically . . . unloved by the mother" and did not get "enough attention." Again, counsel's conduct suggests a tactical basis for his decision to refrain from objecting to the counselor's testimony, because it allowed him to introduce testimony helpful to Halstead's defense. Even if counsel's strategy proved unsuccessful,¹ tactical decisions normally will not constitute ineffective assistance of counsel. *State v. Farni*, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975).²

¶9 And we find no error in the trial court's rejection of Halstead's claim that counsel was ineffective in failing to object to testimony by a doctor that the victim's behavior was consistent with a person who had suffered some sort of trauma. This testimony is similar in nature to evidence concerning the general characteristics of abuse victims to which counsel, presumably for tactical reasons, did not object. In light of the admission of that other testimony, even assuming the doctor's testimony was improper, it was not reasonably likely to have affected the verdict. *See Strickland*, 466 U.S. at 694 (to establish prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

¹Halstead was acquitted of several charges of sexual conduct with a minor and sexual abuse of a minor.

²Notably, Halstead has not articulated why his trial counsel's conduct was anything other than a reasoned, tactical decision, stating only "[t]here does not appear to be a reasoned basis for trial counsel's failures on the record."

¶10 Although Halstead additionally asserts his trial counsel should have objected to evidence of other sexual conduct between him and the victim, we determined on appeal that such evidence was properly admitted. Thus, his ineffective assistance claim based on that evidence necessarily fails. Similarly, a witness's reference to Halstead returning to Arizona because he believed the statute of limitations had run was not improper. Although Halstead complains that the evidence was irrelevant and highly prejudicial, evidence of flight from prosecution is relevant to a defendant's consciousness of guilt. *See State v. Lujan*, 124 Ariz. 365, 371, 604 P.2d 629, 635 (1979). Accordingly, Halstead has failed to demonstrate his counsel was ineffective in failing to object to that testimony.

¶11 For the foregoing reasons, although we grant review, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge